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Nos. 91-543; 91-558; 91-563

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,
Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,
Respondents.

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The Low-Level Radioactive Waste Policy Amendments Act of 1985 is a statute designed to deal with a problem of national concern—adequate provision for the safe disposal of low-level radioactive waste. At the same time, the Act seeks to accommodate the desire of the States to solve the aspects of the problem that implicate concerns that are peculiarly local in nature—in particular the siting of low-level waste disposal facilities—and, as well, to achieve a fair resolution of the conflicting interests of states that already had such facilities and states that did not.

As we show in considerable detail, the Act was crafted through a cooperative interchange between the States and the Congress. The method of the Act is to grant the States, as the States had requested, the primary regulatory authority for establishing and siting low-level radioactive waste disposal facilities, while placing enforceable obligations on the States to carry out that responsibility in a manner that protects the national interests that are involved.

The issue thus posed is whether the Constitution permits federal law to place affirmative regulatory responsibilities on the States in order to achieve national objectives. This Court has not yet elaborated the standards that govern determination of this issue. The Court has only gone so far as to indicate that there is no absolute constitutional bar to such a scheme. A contrary rule would be destructive of the very values that the bar would be meant to protect: strong state government and a dynamic federal system.

Accordingly, we proceed on the understanding that the general guide for judging the constitutionality of a scheme such as that here is whether the scheme in fact undermines the relationship between the States and the United States that is established by the Constitution—specifically, whether the scheme "impairs the ability of the States to function effectively in a federal system." *FERC v. Mississippi*, 456 U.S. 742, 765-766 (1982) (internal quotation marks omitted). The Act here causes no such impairment.

Viewed in practical, as opposed to theoretical, terms, it is implausible to characterize the Act as a mechanism for depriving the States of aspects of their sovereignty. The means employed by the Act cannot sensibly be divorced from its overall purpose: to permit the States to exercise the primary regulatory authority in an area where a scheme of direct federal regulation would have been warranted—and was indeed proposed—in view of the important national concerns involved.

The States sought this regulatory authority in order to preserve their ability to make determinations of great local sensitivity. And the Act is structured so that the States have control over that for which the States will be held accountable. Moreover, in resolving the conflicting interests between sited and non-sited states, the Act restores to the sited states an attribute of sovereignty that the Commerce Clause by itself takes away: the ability to deny to out-of-region generators of low-level waste access to in-state waste facilities.

In these circumstances, the Act must be seen as wholly consistent with the concepts of federalism embodied in the Constitution.

ARGUMENT

1. The federal statute under challenge here—the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. (hereinafter "LLRWPAA" or "the Act")—addresses a problem of *national* concern: adequate provision for the safe disposal of low-level radioactive waste.

Activities that produce vital goods that are part of our national commerce—including devices used in medical treatment, diagnosis and research, as well as the research, development and production of myriad commercial products—also produce the "bad" of low-level radioactive waste.[1] The producers of these goods have no economic or market incentive to take special care in the disposal of this waste any more than any rational economic actor has an incentive to deal with any other externality. And depending on fortuity, the unsafe storage or disposal of such waste may create environmental and public health risks that affect individuals in political entities beyond the borders of the political entity in which the goods were produced.

At the same time, any system for the disposal of low-level radioactive waste necessarily implicates matters of peculiar concern to the States.

First, the siting of waste disposal facilities requires a sensitivity to state and local concerns that is more likely to be manifested by state-level determination than by the fiat of a more distant federal authority.

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[1] *See* National Governors' Association Task Force on Low-Level Radioactive Waste Disposal, *Low-Level Waste: A Program for Action* 3 (Nov. 1980) (hereinafter, "*A Program for Action*"); U.S. Department of Energy, *Spent Fuel and Radioactive Waste Inventories, Projections, and Characteristics* (1984) (cited in Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985*, 11 Harv. Env. L. Rev. 437 (1987) [hereinafter, "*Waste Wars*"]).

Second, in the absence of an applicable federal statute, limitations directly imposed on the States by the Commerce Clause of the federal Constitution serve to frustrate rather than advance responsible state regulation. The states that first provide sites for disposing of low-level waste cannot, consistent with the Commerce Clause, deny out-of-state waste generators access to those sites; that was settled by this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *See* p. 7, *infra*. Thus, the states that are next in line have no incentive to undertake the expensive and unpopular task of developing such sites within their borders. As a result, in the absence of federal regulation, states that have waste disposal sites would be faced—and, in fact, were faced prior to adoption of the Act, *see* pp. 6-7, *infra*—with the choice of bearing an unfair share of a particularly undesirable national burden or of shutting down these faciilties.

The LLRWPAA is the product of an effort to develop a scheme that would accord proper weight to both the federal and the state interests involved in regulating the disposal of low-level radioactive waste. Indeed, as we discuss in some detail, pp. 5-18, *infra*, the Act was crafted through a cooperative interchange between the States and Congress. The result is an enactment that advances national objectives while maintaining the States' primary regulatory authority, and that, in addition, resolves the conflicting interests of differently situated states.

Because a detailed discussion of the history and substance of the Act is necessary to frame properly the issue for decision here, we turn next to that task.

2. With the advent of the nuclear power industry in the 1960's, this nation began generating significant quantities of both low-level and high-level radioactive waste.[2] For a period of time, the Atomic Energy Commission permitted the disposal of low-level waste at sea, but

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[2] H.R. Rep. No. 99-314, pt. II, 99th Cong., 1st Sess. 16 (1985).

safety concerns persuaded the AEC to stop issuing licenses for ocean disposal.[3] As a result, land burial became the exclusive method of disposing of low-level radioactive waste.

During the 1960's, six commercial low-level radioactive waste disposal sites were opened (along with thirteen federal disposal sites for low-level radioactive waste generated by Federal Government defense and research activities).[4] By 1978, however, three of those sites had been shut down as a result of a variety of serious environmental and public health problems.[5] That meant that all low-level nuclear waste was being transported to and dumped at just three sites, one in South Carolina, one in Washington, and one in Nevada (the "sited states").

In 1979, the problem of low-level radioactive waste disposal became even more serious. In July 1979, the Governor of Nevada temporarily closed the Nevada disposal site after a truck arrived leaking its cargo and another truck arrived with its shipment of waste on fire. In October 1979, the Governor of Washington found similar transportation and packaging problems at the Washington site and temporarily closed that site. The Governor of South Carolina—whose facility was receiving nearly 80 percent of the nation's low-level radioactive waste—ordered that facility to reduce the amount of waste it would receive by 50 percent.[6] And the Governor of Washington threatened to shut down the Washington facility entirely by 1982.[7]

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[3] Berkovitz, *Waste Wars, supra*, 11 Harv. Env. L. Rev. at 440.

[4] H.R. Rep. No. 99-314, *supra* note 2.

[5] *Id.* at 17.

[6] *Id.*

[7] *A Program for Action, supra* at 4 n.*. The threat of a closure of the Washington facility became even more imminent in November 1980, when the voters of that state approved an initiative which banned out-of-state wastes from disposal at the facility. That initiative was ultimately held to be violative of the Commerce Clause. *Washington State Bldg. and Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

Given the restirctions placed upon the States by the Commerce Clause, the sited states were left with two undesirable alternatives: either continue to accept the nation's low-level waste and bear the entire burden of the nation's beneficial use of low-level waste-generating technology, or eliminate or reduce in a non-discriminatory manner the amount of low-level waste accepted for disposal, threatening low-level waste generators of the sited states—and, indeed, of the entire nation—with loss of disposal facilities. The Governors of the sited states had made it clear that the first option was unacceptable, and thus a "national crisis . . . in availability of disposal capacity for low level nuclear wastes" was imminent.[8]

Facing such a crisis, the federal government became involved. Several congressional committees held hearings in 1979 with respect to nuclear waste management issues.[9] A number of bills were introduced which contained federal solutions to the low-level waste disposal issue.[10] In addition, the Department of Energy convened a Low-Level Waste Strategy Task Force which developed its own draft bill.[11] Finally, President Carter appointed a State Planning Council on Radioactive Waste Management. *See* 126 Cong. Rec. 20,135 (1980).

The States took steps to remain involved in the issue of low-level waste disposal. In December, 1979 the National Governors' Association created an eight-member Task

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[8] H.R. Rep. No. 96-1382, pt. II, 96th Cong., 2d Sess. 25 (1980).

[9] *See Nuclear Waste Managament: Hearings Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. (1979); *Nuclear Waste Isolation Pilot Plant: Hearings Before the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. (1979).

[10] *E.g.*, H.R. 6390, 96th Cong., 2d Sess. (1980) (Rep. Udall); H.R. 6212, 96th Cong., 2d Sess. (1980) (Rep. Lujan).

[11] *See A Program for Action, supra* n.1, at 2, 33.

Force, chaired by Governor Bruce Babbitt of Arizona, to formulate state policy.[12]

In May, 1980, the State Planning Council, chaired by Governor Riley of South Carolina, submitted its recommendations to President Carter. That Council unanimously concluded that

> [t]he national policy of the United States on low-level radioactive waste shall be that every State is responsible for the disposal of the low-level radioactive waste generated by nondefense related activities within its boundaries and that States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility. [126 Cong. Rec. 20,135 (1980)]

A few months later, the National Governors' Association Task Force issued a forty-one page report—which the Governors' Association unanimously endorsed [13]—reaching the same conclusion as the State Planning Council.[14] Recognizing that "the prospect of a federally-imposed solution is one option," the National Governors' Association concluded instead that "the disposition of low-level waste should be largely a state responsibility" for which a "solution developed by the states is preferable." *A Program for Action* at 5, 1. The Governors recognized, however, that because far fewer than fifty disposal sites were needed, a regional approach made best sense. The Governors thus recommended that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to the low-level waste disposal problem." *Id.* at 6.

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[12] *Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 8 (1983) (testimony of Gov. Evans of Idaho on behalf of the National Governors' Association).

[13] H.R. Rep. No. 99-314, *supra* n.2, at 18.

[14] *See A Program for Action, supra* n.1, at 2, 33.

To "facilitate the establishment of new disposal sites," the Governors further recommended that "Congress should authorize the states to enter into interstate compacts to establish regional disposal sites" and that "such authorization should include the power to exclude waste generated outside the region from the regional disposal site." *Id.* at 7. The Governors explained:

> Without the authority to ban out-of-region waste many states may find it politically difficult to join a new regional waste compact. Not only would this exclusivity power make it more attractive to form regional waste compacts in the first place, but as regions adopt such provisions the pressure will increase on those states which have not yet acted. [*Id.*]

Finally, the Governors' Association expressly addressed the federal solutions then under consideration by Congress. The Association concluded that "coercive measures are unnecessary at this time," and thus

> recommend[ed] that Congress defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of compact consent legislation. States are already confronting the diminishing capacity of present sites and an unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves. [*Id.* at 8-9]

Congress moved quickly to act upon the recommendations of the State Planning Council and National Governors' Association. In July 1980, the Senate took up consideration of a bill which sought primarily to develop a federal solution to the problem of disposing of spent nuclear fuel.[15]

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[15] *See* S. 2189, 96th Cong., 2d Sess. (1980); S. Rep. 96-548, 96th Cong., 2d Sess. (1980).

As reported, the bill contained a provision which could have opened the door to a federal solution to the low-level nuclear waste problem by directing the President to submit a report to Congress on disposal of such waste.[16] But during the floor debate on the bill, Senator Thurmond introduced an amendment for the specific purpose of "implement[ing] recommendations made by The State Planning Council on Radioactive Waste Management to President Carter." 126 Cong. Rec. 20,136. That amendment recognized state responsibility for the disposal of low-level radioactive waste and invited the States to develop interstate compacts to manage the disposal of low-level radioactive waste on a regional basis, with the promise that such compacts could "restrict the use of regional facilities to the disposal of non-Federal low-level radioactive waste generated within the region." *Id.* Senator Thurmond explained:

> It is felt that the authority to exclude low-level waste generated in States outside the boundaries of a region is necessary to induce State participation in such compacts. Also, case law, including a decision by the U.S. Supreme Court in the case of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), indicates that an express congressional grant of exclusivity authority may be a necessary legal prerequisite to a host State's ability to exclude waste generated beyond the boundaries encompassed in a regional compact. [*Id.* at 20, 136]

Senator Thurmond's amendment was adopted by the Senate and the bill was passed by that body. *Id.*

In September 1980, the House Interstate and Foreign Commerce Committee and the House Interior and Insular Affairs Committee each reported out bills addressing the subject of nuclear waste and spent fuel disposal.[17] With

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[16] *Id.* at 16-17.

[17] *See* H.R. Rep. 96-1382, 96th Cong., 2d Sess., pts. I and II (1980).

respect to the subject of low-level radioactive waste, the Commerce Committee's bill closely tracked the Thurmond amendment implementing the recommendations of the State Planning Council and National Governors' Association;[18] the Interior Committee bill, in contrast, leaned towards a federal solution by prohibiting the Nuclear Regulatory Commission from granting exemptions from licensing requirements pertaining to shallow land burial methods unless states had entered into agreements or compacts.[19]

Before the Committee bills reached the floor of the House, a compromise was reached and a joint bill, H.R. 8378, was submitted. That bill, containing the Commerce Committee's provisions regarding low-level waste, *see* § 201 of H.R. 8378, was approved by the House on December 3, 1980. In the short time remaining before the expiration of the 96th Congress, the Senate and House were unable to reconcile their differences over how the federal government should resolve the matter of spent fuel and high-level nuclear waste, but an agreement was reached to strip out the provisions dealing with low-level waste and, on the last day of that Congress, those provisions were enacted into law as the Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-573, 94 Stat. 3348.[20]

As recommended by the Governors, and as proposed by Senator Thurmond, the 1980 Act declared it to be:

> The policy of the Federal Government that—(A) *each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders* except for waste generated as a result of defense activities of the Secretary or Federal research and development activities; and (B) low-level radioactive waste can be most safely

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[18] *Id.*, pt. I, at 34-35.

[19] *Id.*, pt. II, at 25.

[20] In the next session of Congress, a law was enacted imposing a federal solution for high-level radioactive waste and spent fuel. *See* P.L. 97-425, 96 Stat. 2201.

and efficiently managed on a regional basis. [Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348]. [Emphasis supplied]

In furtherance of this policy, the Act authorized the States to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste," which compacts would take effect only after Congress consented. *Id.*, § 4(a)(2)(B). Under the Act, an approved compact could limit access to its disposal facilities to compact states beginning on January 1, 1986. *Id.*, § 4(a)(2)(B).

Following passage of the Act, the States began negotiating the membership and content of regional compacts. By the end of 1983, seven proposed regional compacts had been formed, and four were submitted to the Ninety-Eighth Congress for approval.[21] Extensive hearings were held in that Congress with respect to those compacts and the low-level radioactive waste disposal issue.[22]

Those hearings ended in a "stalemate" [23] or "impasse" [24] that precluded congressional approval of the compacts

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[21] *See* H.R. 1012, 3002, 3777, 4388, 98th Cong., 1st and 2nd Sess. (1983 and 1984).

[22] *See Ratification of Interstate Compacts for Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy and Environment of the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. (Oct. 25, 1983) and 98th Cong., 2d Sess. (February 23-24, 1984); *Low-Level Radioactive Waste Regional Compacts: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (Nov. 3, 1983); *Hearings on Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste, supra*, n.12. The Senate Committee on the Judiciary also held separate hearings on the Northwest, Southeast, Central and Rocky Mountain compacts between November, 1982 and January, 1984.

[23] *Low-Level Waste Legislation: Hearings Before the Subcomm. on Energy and the Environment, House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 2 (March 7-8, 1985) (statement of Chairman Udall).

[24] *Low-Level Radioactive Waste Disposal: Joint Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 2 (1985) (statement of Chairman Simpson).

that had been submitted. The reason was simple: despite the progress that had been made in forming compacts, no new disposal sites had been created, and the projection was that it would take until 1988 at the earliest for additional sites to open. Yet the three sited states had each entered into interstate compacts, in accordance with the 1980 Act, which would have permitted them to deny access to their disposal facilities on and after January 1, 1986.

The Senators and Representatives of the unsited states thus opposed ratification of these compacts, whereas the legislators from the sited states demanded that the promise that had been made to their states in the 1980 Act be honored.[25] Indeed, the Governors of the sited states—while expressing some willingness to continue accepting out-of-region waste under certain circumstances—threatened to take action to reduce the capacity of or close their disposal sites if they continued to be obligated to accept waste for the entire country.[26]

In an effort to break this impasse, Representative Udall, the Chairman of the House Interior Committee, drafted a bill which he then circulated to all of the States.[27] In October 1984, Representative Udal introduced a revised version of that bill.[28] Following intro-

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[25] *Id.* at 1-2; *see also Hearings on the Status of Interstate Compacts, supra* n.12, at 14 (statement of Washington State Sen. Gorton); *id.* at 22 (statement of David Stevens, Office of the Governor, Washington); *id.* at 24 (statement of S.C. State Sen. Setzler).

[26] *See, e.g., Joint Hearings on Low-Level Radioactive Waste Disposal, supra* n.24, at 48 (statement of Rep. Derrick); *id.* at 249 (testimony of Gov. Gardner).

[27] *Hearings on Low-Level Waste Legislation, supra* n.23, at 2.

[28] In February, 1985, Rep. Udall reintroduced his bill as H.R. 1083, 99th Cong., 1st Sess.; Senator McClure, the Chairman of the

duction of the bill, the National Governors' Association sponsored over a dozen meetings to attempt to arrive at a state consensus.[29] Representative Udall worked with the sited states and the Governors' Association "to see if a settlement could be achieved." [30] Ultimately the House Interior Committee reported out a revised version of Representative Udall's bill which "represent[ed] the diligent negotiating undertaken by that group" and which "embodied" the "fundamentals of their settlement." [31]

As originally introduced, Representative Udall's bill would have required the sited states, in return for obtaining approval of their regional compacts, to agree to continue receiving out-of-region waste for an additional seven years (*i.e.*, until 1993), but at a significantly reduced volume.[32] But South Carolina objected that "the seven year 'transition' period is too long" and that the "only real result from such a lengthy extension of access will be to undercut efforts to site new facilities" by "encourag[ing] the belief that, once again, the problem has been postponed until some indefinite time in the future." [33]

Eventually South Carolina agreed to accept a seven-year extension if "enforceable milestones" with "real teeth" were legislated to "ensure continuing progress toward opening new sites during the transition period." [34]

Senate Committee on Energy and Natural Resources, introduced a parallel bill, S. 1517, 99th Cong., 1st Sess. (1985).

[29] H. Brown, *The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985* iv (Nov. 1986).

[30] 131 Cong. Rec. H13,075 (daily ed. Dec. 19, 1985).

[31] *Id.*

[32] H.R. 1083, as introduced, is reprinted in *Hearings on Low-Level Waste Legislation, supra* n.23, at 35-51.

[33] *Id.* at 295 (testimony of Gov. Richard Riley of South Carolina).

[34] *Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 160 (June 12, July 18, 1985) (testimony of Gov. Riley); *see also id.* at 170 (Rep. Derrick).

The State of Washington strongly agreed. Senator Thurmond introduced such a bill, which was supported, at least in principle, not only by the sited states, but also by a number of the unsited states, *including the State of New York*. Thus, Charles Guinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified before the House Interior Committee that:

> It is appropriate for specific and easily identifiable milestones to be required to be met as incentives for continued progress on facility development by the unsited regions. Milestones which were suggested during the interregional discussions included host state selection, site identification and license application. *Appropriate penalties could be developed for failure to meet these milestones.* [*Hearings on Low-Level Waste Ltgislation, supra* n. 23, at 1981 (emphasis supplied)].

The legislation that was enacted—the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240, 99 Stat. 1842—follows this appuroach. The Act declares that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of low-level radioactive waste." *Id.* § 3(a)(1)(A), 42 U.S.C. § 2021c(a)(1)(A).[35] The Act consents to the various regional compacts that had been submitted to Congress, each of which provides for the exclusion of out-of-region waste. *Id.* §§ 211-27. The Act compels the existing sites to continue to accept out-of-region waste, within certain limits, through 1992. *Id.* § 5(a), (b), 42 U.S.C. § 2021e(a), (b). And the Act contains a set of enforceable "milestones" which the non-sited states must meet.

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[35] This language originated in Representative Udall's original bill and engendered no controversy whatsoever; the quoted language strengthens the 1980 Act which declares it to be the "policy of the Federal Government that each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste."

In particular, the Act required each state by July 1, 1986 to either ratify compact legislation or certify its intent to develop a site within the state for the location of a low-level radioactive waste disposal facility. By January 1, 1988, each non-sited compact region and each state not in any compact region was required to identify the site for the proposed disposal facility. And by January 1, 1990, each region or state was required to file a complete application with the Nuclear Regulatory Commission for a license to operate a waste disposal facility. *Id.* § 5(e), 42 U.S.C. § 2021e(e). In each case, if a region or state failed to meet a "milestone," the region or state could be denied access to the existing disposal sites. *Id.*

The Act contains one additional milestone and penalty provision—the so-called "take title" provision. That provision is not triggered until January 1, 1996—six years after each region or state was obligated to have applied to the NRC for a license to operate a disposal facility, four years after the existing sites are to be closed to out-of-region waste, and at least three years after, on the most conservative estimates, all planned-for sites should be on-line. At that time, any State which still does not have disposal capability itself or through a regional compact, will be required, upon the request of a generator or owner of waste within the State, to

> take title to the waste . . . take possession of the waste, and . . . be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the state to take possession of the waste . . . [*Id.* § 5(d)(2)(C), 42 U.S.C. § 2021e(d)(2)(C).]

This last provision originated with the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works chaired by Senator Simpson.[36]

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[36] *See* S. 1578, 99th Cong., 1st Sess. § 5(g)(92)(C) (1985) (as reported). *See also* 131 Cong. Rec. 38,141 (1985) (remarks of Sen. Johnston).

It was added to the bill, as Senator Hart, the ranking minority member of the Subcommittee explained, because:

> We were concerned . . . that a state may choose to "manage" its waste by telling the waste generators that they had to develop a means of storage for their waste. Such a policy would be unacceptable from our perspective and would leave generators with no effective recourse. [131 Cong. Rec. 18,405].

As testimony before Congress made evident, the long term storage of nuclear waste by generators would create a threat to public health and safety:

> There is a basis in radiological health and safety for a firm deadline for the execution of both state and federal disposal responsibilities. For many generators of LLW [low-level waste], the only feasible alternative to disposal short of curtailing waste generation is storage. Long-term storage would likely result in additional occupational radiation exposures, particularly if waste repackaging is needed to meet transportation or disposal requirements. Although some long-term storage is probably unavoidable under current circumstances, this practice should not continue indefinitely. A firm deadline for the acceptance of wastes for disposal by both the states and the federal government is essential to provide assurance that long-term storage does not become *de facto* disposal for lack of an alternative. [*Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 352 (1985) (comments of Nuclear Regulatory Commission)].[37]

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[37] *See also Joint Hearings on Low-Level Radioactive Waste Disposal, supra* n.24 (testimony of J. Vaughan, Department of Energy) ("As drafted, if a State or compact region didn't meet their specified milestones, penalties contained in the bills accrue primarily to waste generators within that State or compact region, either by loss of access or by increased fees, or both. Congress may wish to clarify the specific responsibilities of the States themselves for managing their waste if they don't meet the milestones"); *id.* at

Thus, a policy of leaving waste disposal to the generator was deemed "unacceptable" by Congress, 131 Cong. Rec. 18,405 (Sen. Hart), and the take-title provision was added, as Senator Hart explained, to

> make it clear . . . that States cannot continue to rely on other entities to solve the low-level waste disposal problem and we require States to take title to the waste in 1996. . . . [131 Cong. Rec. 38,406].

Senator Johnston added:

> In my opinion, this language is essential to provide the teeth . . . We need this language to ensure that we are not faced in the 1990's with the same situation we face today—inaction by a few generating States and no available leverage to force action [*Id.*]

3. a. Turning now to the legal question posed by this sequence of events, we begin by defining the issues raised by petitioners' challenge to the Act.

When the States exercise primary regulatory responsibility in an area where the regulation must accomplish both state and federal objectives, it is necessary—as the States themselves recognized in their legislative proposals to Congress here—to take account of the possibility that a state will act in a manner that furthers its interests and that fails to further the national interests. It is precisely because of this possibility that the Act at issue, after providing that the States are to have the primary regulatory authority, places affirmative obligations on "state regulatory machinery to advance federal goals." *FERC v. Mississippi*, *supra*, 456 U.S. at 759.

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79 ("It would be a particularly unfortunate development if States that did *not* pursue compact formation or development of their own disposal facilities required their waste generators to store waste on a prolonged interim basis. This could be inadvisable from technical, environmental, financial, and policy standpoints"); *id.* at 112 (testimony of Nuclear Regulatory Commission) (agreeing with testimony of Department of Energy).

As the Council of State Governments acknowledges in its brief *amicus curiae*, the only alternative that would safeguard the federal interests involved would leave the States with *less*, not more, ability to govern with respect to the disposal of low-level radioactive waste:

> Without doubt, finding responsible ways to dispose of radioactive waste is an important concern. But any federal interest in regulating radioactive waste disposal can easily be vindicated without issuing directives to the states. Congress has the unquestioned power to regulate interstate traffic in radioactive waste. It has full authority to designate, and even acquire by condemnation, adequate disposal sites. [Brief *Amicus Curiae* of Council of State Governments at 17.]

Very simply stated, then, the argument on petitioners' side is that where both national and state interests are involved, the Constitution dictates that any federal legislation designed to further both sets of interests must be administered solely by federal authorities. That argument frames the ultimate issue in this case.

b. It is important to place this issue in its proper context, and to distinguish the issue presented here from other related issues.

Our constitutional system does not create a relationship between the States and the federal government, or between the individual states *inter se*, that partakes of the relationship between sovereign nations. In relation to the States, the United States has only those limited powers expressly delegated to the federal government by the Constitution. The States, in turn, retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). It is very much to the point here, for example, that, as we have seen, the Commerce Clause denies each

state the sovereign power to control commerce between its citizens and citizens of other states.

One aspect of the constitutional limitations on the sovereignty of the States has been addressed in depth by the line of cases culminating in *Garcia*: "the extent to which state sovereignty shields the States from generally applicable federal regulations." *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). Specifically, the question confronted by the *Garcia* cases is whether the Constitution exempts a state in its capacity as an economic actor—*viz*, as an employer, a waste generator, or as part of any other class of actors who are in, or who affect, interstate commerce—from federal regulations that are generally applicable to the class of actors to which the state belongs.

The *Garcia* Court "reject[ed] as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 547-548. And the Court ruled that any broader rule of state immunity from federal regulation would be inconsistent with "the shape of the constitutional scheme," *id.* at 550, which "works a[] . . . sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative power and to displace contrary state legislation," *id.* at 548. *Garcia* explains that "apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I power," insofar as the States seek protection from efforts by the federal government to displace state laws with uniform federal rules, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," *id.* at 550-551.[38]

[38] *Garcia* is the law and this is not an occasion that calls for further elaboration on its rationale. We would be derelict, however, if we did not respond to the attack on that decision in the brief filed by *Amicus Curiae* Council of State Governments. That brief argues

We recognize that the question posed here is different from that posed in *Garcia*, and that the result in *Garcia*

(Br. at 15) that insofar as *Garcia* reads the framers to have relied on the political process to protect the interest of the States, the decision is "alien to ordinary principles of constitutional interpretation" because "structural postulates" are not "ordinarily left to the tender mercies of the political process." The Council argues that the Court's "approach to the balance between state and federal authority" should "parallel" its "approach to policing the borders of executive or legislative power." *Id.* at 14.

But *Garcia* adopts such a parallel by emphasizing the role of the judiciary in confining Congress to the exercise of its enumerated powers, just as the judiciary, in separation-of-powers cases, confines each branch to its enumerated powers. That emphasis far from being "alien" is deeply rooted in a great mass of constitutional history and precedent. Thus, the *Garcia* Court—like the Court in *Sperry v. Florida*, 373 U.S. 379, 403 (1963) and *Reina v. United States*, 364 U.S. 507, 512 (1960)—quoted James Madison's statement in the First Congress during the debates over the creation of the Bank of the United States:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given they might exercise it, although it should interfere with the laws or even the Constitution of the States. [II Annals of Cong. 1987]

See also 3 *The Debates in the Several States Conventions on the Adoption of the Federal Constitution* at 186 (Virginia) (J. Eliot ed.) (if "a question arises with respect to the legality of any power exercised or assessed by Congress," the judiciary would ask "is it enumerated in the Constitution. If it be, it is legal and just"); 3 J. Story, *Commentaries on the Constitution of the United States* 753-54 (1st ed. 1833) ("It is plain . . . that it could not have been the intention of the framers of this [Tenth] amendment to give it effect as an abridgment of any of the powers granted under the constitution . . . . Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted"); *Northern Securities Co. v. United States*, 193 U.S. 197, 345 (1904); *Hoke v. United States*, 227 U.S. 308, 320 (1913); *United States v. Sprague*, 282 U.S. 716, 733 (1931); *Sanitary District v. United States*, 266 U.S. 405, 424-26 (1925); *United States v. California*, 297 U.S. 175, 183-84 (1936); *Ashwander v. TVA*, 297 U.S. 288, 330 (1936); *Wright v. Union Central Ins. Co.*, 304 U.S.

may not govern the decision in this case. What is involved here is a set of affirmative obligations established by federal law that applies only to the States, and not to a more general class of economic actors, and that applies to the States in their unique capacities as law generators and law enforcers. The claim in his case is not that state law must prevail over federal law but rather that federal law cannot compel the States to enact laws against the States' desires.

c. This Court has on at least two occasions recognized that the issue posed by this kind of federal regulation is distinct from the issue posed in the *Garcia* line of cases. *FERC v. Mississippi*, 456 U.S. 758-59 ("the extent to which state sovereignty shields the States from generally applicable federal regulations" is a different issue from the validity of "Federal Government attempts to use state machinery to advance federal goals"); *South Carolina v. Baker*, 485 U.S. 505, 543-44 (1988) (same). *See also*, Brief for Petitioner State of New York at 19; Brief for *Amicus Curiae* Council of State Governments at 11.

The Court has not, however, elaborated the standards that govern the constitutional propriety of a federal regulatory scheme that enlists state authorities to pursue federal objectives. As we show at pp. 24-25, *infra*, the Court has only gone so far as to indicate that there is *no* absolute constitutional bar to such a scheme. And for the reasons we set forth below, an absolute bar would be destructive of the very values that the bar would be meant to protect: strong state government and a dynamic federal system.

Against that background we proceed on the understanding that the general guide for judging the constitutionality of any such federal regulatory scheme is that set out

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502, 516 (1938); *United States v. Darby*, 312 U.S. 100, 124 (1941); *California v. United States*, 320 U.S. 577, 586 (1944); *Case v. Bowles*, 327 U.S. 92, 101-02 (1946).

by the *FERC* Court: whether the scheme in fact undermines the relationship between the States and the United States that is established by the Constitution—specifically, whether the scheme "impairs the ability of the States 'to function effectively in a federal system.'" *FERC v. Mississippi*, 456 U.S. at 765-766 (quoting *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975)). The Act in question here causes no such impairment.

d. In the final analysis, petitioners and their *amicus curiae* do not base their constitutional claim on the plain language of the Constitution. Rather, their contention is that federal schemes of the kind at issue here are contrary to the theory and structure of the Constitution in the following respect: If the United States can direct state agencies to carry out politically controversial federal policies, the federal government could escape accountability for those policies and the States could be held politically accountable for actions that are not of their own making. This, we are told, would be destructive of political accountability at both the state and federal levels. In the context of the instant case these concerns about the proper allocation of responsibility between the United States and the States have a hollow sound.

Viewed in practical, as opposed to theoretical, terms, it is implausible to characterize the Act as a mechanism for depriving the States of aspects of their sovereignty. The means employed by the Act cannot sensibly be divorced from its overall purpose: to *permit* the States to exercise the primary regulatory authority in an area where a scheme of direct federal regulation would have been warranted—and was indeed proposed—in view of the important national concerns involved. The States sought this regulatory authority in order to preserve their ability to make determinations of great local sensitivity.

The obligations the Act places on the States (and/or on compact regions) are to establish and site sufficient and appropriate waste disposal facilities. The history of this

legislation shows that the States sought these precise obligations. The States did so precisely because of a consensus at the state level that it was *not* desirable for the federal government to site and establish these facilities. The legislative proposals submitted by the States—and expressly supported by, *inter alia*, the State of New York, *see* p. 15, *supra*—contain the very affirmative regulatory obligations that New York now challenges. *See* pp. 15-16, *supra*.

The Act, moreover, assures the States control over that for which the States will be held accountable: both the number of disposal facilities to be sited and the siting of particular disposal facilities are to be determined by the States, acting either on an individual basis or through regional compacts, and without any active federal role. Neither the Act nor any federal authority dictates the determinations to be made by the States in these respects. Instead, the Act provides incentives, both positive and negative, to induce the States to make those determinations in a way that fulfills not only the local interests but the national interests that are involved.

Finally, in the absence of the legislation, the non-sited states had rights with respect to low-level waste disposal and the sited states had obligations in that connection that are *not* characteristic of sovereign entities. The non-sited states had the right of access to disposal sites in sited states on a nondiscriminatory basis; and the sited states had the obligation to accept such waste on that basis. *See* pp. 5, 7, *supra*. Nothing in the law of nations or in any concept of sovereignty creates such a right or such a corresponding obligation. The Act thus *restores* to the sited states an attribute of sovereignty that the Commerce Clause by itself takes away.

In these circumstances, it cannot fairly be maintained that the Act "impairs the ability of the States to function effectively in a federal system." *FERC v. Mississippi*, 456 U.S. at 765-66. Thus, the Act could be subject to

constitutional invalidation only if the Constitution erects an absolute bar to federal legislation that enlists state agencies in the enforcement of federal laws. What little precedent exists on this point in this Court's decisions indicates that the Constitution does *not* absolutely bar the "enlist-[ment of] a branch of state government . . . to further federal ends." *FERC v. Mississippi*, 456 U.S. at 762. In that case the Court summarized its prior decisions as follows:

> While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA v. Brown*, 431 U.S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions. In *Fry v. United States*, 421 U.S. 542 (1975), for example, state executives were held restricted, with respect to state employees, to the wage and salary limitations established by the Economic Stabilization Act of 1970. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), acknowledged a federal court's power to enforce a treaty by compelling a state agency to "prepare" certain rules "even if state law withholds from [it] the power to do so." *Id.*, at 695. And certainly *Testa v. Katt*, *supra*, by declaring that "the policy of the federal Act is the prevailing policy in every state," 330 U.S. at 393, reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends. [456 U.S. at 761-762 (footnote omitted)].

While it may be that certain federal schemes that enlist state agencies could threaten the integrity of state government and thus implicate *implicit* constitutional values, we know of no constitutional value that absolutely bars that approach in the instances in which the approach *is* perfectly compatible with—indeed, enhances—"the ability of the States 'to function effectively in a federal system'." *Id.* at 765-66.

As the instant case illustrates, such an absolute bar would serve neither the interest of strong state government nor that of a vital and dynamic federal system. As a by-product of our technological progress, we face a growing number of situations—like the one here—in which there is a pressing need for national regulation of transactions that have aspects that are peculiarly of national concern and aspects that are peculiarly of local concern. In the instant case, a cooperative legislative effort between the States and the Congress resulted in a regulatory scheme that preserved—and, in at least one respect, enhanced, *see* p. 24, *supra*—the regulatory authority of the States while at the same time accomplishing national objectives.

If that option had not been available, the Congress had the Commerce Clause power—and it appears the will—to enact direct federal regulation of low-level radioactive waste disposal and to oust the States from all regulatory authority. And, in general, a rigid constitutional rule barring all employment of state authorities in federal regulatory programs would push toward a greater, not a lesser, concentration of power in the hands of the central government. Faced with the choice of addressing national problems through federal regulation or not at all, the United States would inevitably occupy more and more of the ground on which the States and the federal government have overlapping, albeit not congruent, interests. Our federalism would not be served by such a self-destructive construction of the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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